

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

SECOND APPEAL NO. 613 OF 2007

Bateshwar Sardarimandal through LR's vs. Dharamraj N. Shrivastava

Office Notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's orders

CORAM : B.P. DHARMADHIKARI, J.
DECEMBER 18, 2007.

Heard Shri Khan, learned counsel for the appellants – LR's of original plaintiff.

The plaintiff's suit for specific performance on the basis of Bayan Patra (Exh. 86) has been dismissed totally by the trial Court and appellate Court has allowed his appeal partly by directing refund of earnest money.

Shri Khan, learned counsel states that the appellate Court has dismissed the suit only because suit property was not properly described. He wants to rely upon certain judgment and show that mere error in description of boundaries of property is not fatal to the suit. He further relies upon Section 47 of Transfer of Property Act to contend that even though it is presumed that agreement is by one of the co-owners, still the share of such co-owner is answerable in Civil Suit for specific performance. He, therefore, states

that suit ought to have been decreed. He further argues that the appellant – plaintiff has been placed in possession and even today he is in possession of suit property.

The perusal of both judgments reveal that the Courts below have concurrently recorded that plaintiff/appellant is not in possession. The Courts have further found that there were two co-owners in the property and both co-owners were not parties to agreement at Exh. 26 and to the suit. In these circumstances, power under Section 20 of Specific Relief Act which confers discretion to the Court to deny specific performance has been exercised.

Shri Khan, learned counsel has invited attention to appeal memo particularly Questions No. 3 & 4 to argue that the said questions arise in this appeal. The perusal of those questions show that those questions are dependent upon facts on which particular view is already taken by the Courts below and in any case those are not substantial questions of law. Second Appeal is, therefore, dismissed. No order as to costs.

JUDGE